MARATHON OIL CO. (ON RECONSIDERATION)

IBLA 85-794 Decided July 20, 1988

Motion for reconsideration of Marathon Oil Co., 94 IBLA 78 (1986), which affirmed in part and reversed in part a decision of the Minerals Management Service to disburse disputed royalty payments.

Motion for reconsideration granted, prior Board decision vacated in part; decision of Minerals Management Service affirmed.

1. Accounts: Generally -- Accounts: Distribution of Receipts -- Administrative Procedure: Generally -- Federal Oil and Gas Royalty Management Act of 1982: Royalties -- Mineral Leasing Act: Royalties -- Rules of Practice: Appeals: Generally

   Sec. 104(a) of the Federal Oil and Gas Royalty Management Act of 1982, amending sec. 35 of the Mineral Leasing Act of 1920, 30 U.S.C. § 191 (1982), authorizes but does not require retention of challenged royalty payments payable to a state in a suspense account pending resolution of the dispute. No authority is found in this statutory provision for payment of interest to the lessee/payor on any royalty payments ultimately found to be refundable.

   Marathon Oil Co., 94 IBLA 78 (1986), vacated in part.

APPEARANCES: Patricia L. Brown, Esq., Washington, D.C., for appellant; Geoffrey Heath, Esq., and Peter J. Schaumberg, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Counsel for the Minerals Management Service (MMS) has filed a motion for reconsideration of our decision in this case cited as Marathon Oil Company, 94 IBLA 78 (1986). In that decision involving royalty amounts subject to legal challenge 1/ which were paid for natural gas produced from Alaskan

1/ The amount of royalty due has been the subject of litigation. Marathon Oil Co. v. United States, 604 F. Supp. 1375 (D. Alaska), aff'd, 897 F.2d 759

oil and gas leases on Federal lands, the Board reversed the decision of MMS 2/ to disburse the amount of the disputed royalty payable to the State. The Board further required that an interest-bearing suspense account be established for such disputed royalties pending final resolution of the Federal court litigation concerning the amount due. 3/ By order of October 28, 1986, implementation of the Board's decision in this case was stayed pending review of the motion for reconsideration.

Our decision in this case was based on our reading of section 35 of the Mineral Leasing Act of 1920 (MLA) as modified by section 104(a) of the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA). We interpreted this provision as requiring establishment of an interest-bearing suspense account for royalty sums payable to the State which were under challenge in the litigation.

In support of its motion for reconsideration, counsel for MMS asserts that payment of interest on disputed amounts placed in a suspense account is only authorized for amounts which are ultimately determined to be payable to a state. MMS contends there is no statutory authority for payment of interest on any sums which might be refunded to the lessee. Further, it is pointed out that the statute does not authorize investment of funds placed in a suspense account with payment of proceeds to the prevailing party.

Placement of royalty payments under challenge in a suspense account is optional under MMS's construction of the law. Indeed, MMS contends its policy has been to promptly disburse royalty payments recouping any overpayment from subsequent payments to the distributee. MMS argues that proceeding differently would greatly increase its interest liability which must be funded by congressional appropriations. MMS also asserts our decision is inconsistent with our prior decision on the pay-pending-appeal issue in Marathon Oil Co., 90 IBLA 236, 93 I.D. 6 (1986), where the Board found the lessee was threatened with irreparable injury in the form of lost interest

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fn. 1 (continued)
(9th Cir.), cert. denied, __ U.S. __, 107 S. Ct. 1593 (1987). Although the substantive issues regarding the liability of the lessee have apparently now been settled, MMS acknowledges the matter is still pending before the U.S. District Court for a final accounting.

2/ Although the decision was implemented by the Associate Director for Royalty Management, the Board found the decision was approved by the Director, MMS, and, hence, was appealable to the Board under the regulations at 30 CFR 290.2 and 290.7. Accordingly, we denied a motion by MMS to dismiss the appeal for lack of jurisdiction.

3/ The decision also dealt with disputed royalties for leases on lands conveyed to Native corporations under the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601-1629a (1982). With respect to royalty payments under these leases payable to a Native corporation under section 14(g) of ANCSA, 43 U.S.C. § 1613(g) (1982), the Board found no statutory authority for creation of a suspense account and affirmed the MMS decision to disburse the royalties. We have not been asked to reconsider this part of the decision.

on royalty payments required to be paid pending resolution of the issue of liability on appeal.

Finally, MMS seeks clarification of our holding that the decision of the Associate Director for Royalty Management to disburse the funds was approved by the Director of MMS and, thus, was appealable to this Board.

Counsel for Marathon Oil Co. has opposed the motion for reconsideration. Marathon contends that under the statute royalties payable to a state which are under challenge are to be placed in an interest-bearing suspense account. Marathon finds authority in the statute for payment of interest on suspense account funds to the lessee/payor if a refund of royalty payments is required. Lack of authority to invest the escrow funds is not deemed by Marathon to be any impediment to payment of interest on those funds, noting that the funds may be deposited in the Treasury pending resolution of the dispute. With respect to the threat of irreparable injury noted in the paypending-appeal cases, Marathon points out that the issue in this case on reconsideration involves only that part of the royalty payment payable by the Federal Government to the State and lost interest would still be a problem for other components of the royalty payment.

The Board may reconsider a decision in extraordinary circumstances where sufficient reason is shown therefor. 43 CFR 4.403. In view of the substantial questions raised regarding statutory authority for requiring placement of disputed royalty payments in a suspense account and for payment of interest on funds refundable to the lessee/payor, we find it appropriate to reconsider our prior decision in this case. Accordingly, the motion for reconsideration is granted. 4/

The statute at issue in this case, section 104(a) of FOGRMA, amending section 35 of the MLA, codified at 30 U.S.C. § 191 (1982), provides in pertinent part:

> Payments to States under this section with respect to any moneys received by the United States, shall be made not later than the last business day of the month in which such moneys are warranted by the United States Treasury to the Secretary as having been received, except for any portion of such moneys which is under challenge and placed in a suspense account pending resolution of a dispute. Such warrants shall be issued by the United States

4/ In our earlier consideration of these issues we did not have the benefit of a brief on the merits from MMS. Counsel apparently elected to rely on the motion to dismiss for lack of jurisdiction which was denied by the Board. We note that the regulations governing appeal procedures before the Board do not provide for a bifurcated time to answer where a threshold matter of jurisdiction is raised. See 43 CFR 4.414. Accordingly, an answer to the merits should ordinarily be filed at the same time any threshold jurisdictional matters are raised. Although it is not the purpose of reconsideration to provide a second opportunity for briefing, reconsideration is properly granted where, as here, good reason appears therefor.

> Treasury not later than 10 days after receipt of such moneys by the Treasury. Moneys placed in a suspense account which are determined to be payable to a State shall be made not later than the last business day of the month in which such dispute is resolved. Any such amount placed in a suspense account pending resolution shall bear interest until the dispute is resolved. [Emphasis added.]

The issue raised is whether this statutory provision requires MMS to place disputed royalty amounts in a suspense account pending resolution of the amount of royalty due and whether it authorizes payment of interest on such amounts as are found to be refundable to the lessee/payor.

[1] Reading the statutory language, it is clear MMS is authorized to place challenged royalty payments in a suspense account, but not so clear that MMS is required to establish a suspense account for such funds. Section 104(a) of FOGRMA expressly requires payment to the State of its share of the royalties by the last day of the month in which such payment is certified as having been received by the Treasury, subject to only one exception. The exception applies to funds which are under challenge and which are placed in a suspense account pending resolution. The use of the conjunctive suggests there may be situations where disputed amounts are not placed in a suspense account. By implication, our prior decision found that the statute requires creation of the suspense account for challenged payments. 5/ Such a reading of the terms of the statute, ignoring the conjunctive "and," could only be based on a finding that the intent of section 104(a) of FOGRMA was to protect the lessee/payor (as well as the State) regarding payment of challenged royalty amounts by authorizing payment of interest on any funds later found to be refundable to the lessee/payor. However, it now appears that a fair reading of the statutory language, as well as the legislative history, does not support such a conclusion.

Reference to the underscored language in the above-quoted sentences from section 104(a) of FOGRMA makes it clear that the term "any such amount" placed in a suspense account which shall bear interest is defined by language from the immediately preceding sentence identifying "moneys placed in a suspense account which are determined to be payable to a State." This construction is also supported by reference to section 111 of FOGRMA, 30 U.S.C. § 1721 (1982), concerning interest on royalty payments. Section 111(a) provides that where royalty payments are not timely received by the Secretary, interest shall be charged on such payments at the rate applicable under section 6621 of the Internal Revenue Code of 1954. Section 111(b) provides that any payment made by the Secretary to a state under section 35 of the MLA which is not timely shall include an interest charge computed at the same rate. No authority is provided for payment of interest on royalty refunds to lessees.

5/ This was the necessary implication of our finding that the statutory language authorized such a course of action, that MMS gave no explanation for the failure to do so, and our reversal directing such action rather than remanding for an exercise of discretion. Marathon Oil Co., supra at 83.

This construction is further supported by reference to the legislative history. In discussing language which later became sections 111(a) and (b), the House report recited:

> This section established interest penalties for late payments in the cases where royalty payments are not received by the Secretary on the date that such payments are due and when the Secretary fails to make payment to a State or Indian tribe on the date required. The interest penalty so charged is at the rate applicable under section 6621 of the Internal Revenue Code of 1954, a rate based in part but higher than the prime interest rate. Such interest penalties are deemed part of royalty payments. Imposition of such high penalties against those owing money to the United States is to remove the incentives such persons may have to hold the money owned and invest it rather than pay it on time to the MMS. Also, the high penalty required of the United States should be a strong incentive to the MMS to disburse moneys under the mineral leasing laws of 1920 promptly.

H.R. Rep. No. 859, 97th Cong., 2nd Sess. 36, reprinted in 1982 U.S. Code Cong. & Admin. News 4268, 4290. The thrust of the legislation and the interest provisions was clearly on timely payment of royalty amounts and timely pass through of these payments to the States and Indians.

It is well established that interest does not accrue on a claim against the United States Government in the absence of express provision therefore in a statute or in the terms of a contract. United States v. Louisiana, 446 U.S. 253, 264-265 (1980). On reconsideration, we conclude that section 104(a) of FOGRMA does not provide authority for MMS to pay interest to the lessee/payor on any challenged royalty payments which are ultimately determined to be refundable to the lessee/payor.

Counsel for MMS has requested clarification of the question of jurisdiction over this appeal from authorization of disbursal by the Associate Director for Royalty Management notwithstanding the objection of Marathon. The Board's analysis of the issue is expressed in the finding that:

> Thus it seems clear the Director did approve Boldt's decision to distribute the funds. This being the case, there was no need for Marathon to appeal to the Director from Boldt's decision. See 30 CFR 290.2.

94 IBLA at 81. Counsel for MMS recognizes the "unique" factual context of this appeal in which numerous amended notices of appeal were served by Marathon on the Director, MMS, on which no action was taken, supporting a conclusion that the case was viewed as final within MMS and was properly before the Board. Further elaboration by the Board would entail consideration of hypothetical situations and, hence, is inappropriate.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the motion for reconsideration is granted, the prior decision of the Board is vacated in part, and the decision of MMS is affirmed.

C. Randall Grant, Jr.
Administrative Judge

I concur:

John H. Kelly
Administrative Judge

ADMINISTRATIVE JUDGE MULLEN DISSENTING:

I am not unsympathetic with the arguments advanced by Minerals Management Service (MMS) in this case. However, the arguments are presented to the wrong forum. The concerns expressed to this Board are properly addressed to Congress.

As noted in the majority opinion, it has been the policy of MMS to promptly distribute royalty payments with recoupment of any overpayment from subsequent payments to the distributee. In effect, the action of MMS renders the "suspense account" language in 30 U.S.C. § 191 (1982) meaningless. In effect, MMS has admitted that there will never be an occasion for placing funds in a suspense account. The majority finds that 30 U.S.C. § 191 (1982) does not require MMS to place the funds in a suspense account and MMS has strongly stated its reasons for never doing so. I do not find this to be in accord with the intent of Congress.

The majority addresses the incentive for speedy distribution of royalties under the Federal Oil and Gas Royalty Management Act of 1982. There can be no doubt that there is this incentive. However, the Act was also passed to give incentive for an expeditious resolution of royalty disputes. The interpretation of the Act as urged by MMS and adopted by the majority effectively destroys this incentive. If a bond is tendered in lieu of royalty payment, that bond must cover the cost of interest on the money until the dispute is resolved. Without a call for a suspense account upon the payment of royalty amounts in dispute, if those funds are tendered, there is no reason for MMS to press for resolution of an underlying royalty dispute.

I cannot join the majority in its determination that the statute affords the latitude expressed in the majority opinion. To allow MMS to completely ignore the specific language of 30 U.S.C. § 191 (1982) because that language places a burden on MMS, or because the drafters of the language did not provide means of funding the interest payment is tantamount to amending that section of the Act by deleting that language. I do not believe this Board has that power.

R. W. Mullen
Administrative Judge